Supreme Court, U.S.
FILED
AUG 03 1994
OFFICE OF THE CLERK

No. 95-37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JODY M. BERARDI,
Petitioner,

vs.

ANHEUSER-BUSCH, INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUSAN NELL ROWE
(Counsel of Record)
THE STOLAR PARTNERSHIP
911 Washington Avenue, 7th Floor
St. Louis, Missouri 63101
(314) 231-2800

Counsel for Respondent

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

BEST AVAILABLE COPY

QUESTION PRESENTED BY PETITIONER

Was evidence of intimidating and harassing phone calls made to a plaintiff in a Title VII gender discrimination case, properly excluded for lack of authentication that the calls had been made by an employee of the defendant, when the evidence before the District Court was that the defendant's own security and personnel officers concluded that the caller could be from the defendant's facility?

LIST OF PARTIES

Jody M. Berardi, Petitioner, is an individual residing in the State of Missouri. Respondent, Anheuser-Busch, Inc., is a Missouri corporation with its principal place of business in St.Louis, Missouri.

TABLE OF CONTENTS

	Page
Question Presented by Petitioner	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Rules Involved	2
Statement of the Case	2
Summary of Argument	4
Reasons for Denying the Petition for a Writ	6
Conclusion	13

TABLE OF AUTHORITIES

Page(s)

Cases:

Campbell v. Ingersoll Milling Machine Co., 893 F.2d 925 (7th Cir. 1990), *cert. denied*, 498 U.S. 844 (1990) 13

Di Paola v. Riddle, 581 F.2d 1111 (4th Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) 12

Foster v. Ford Motor Co., 621 F.2d 715 (5th Cir. 1980) 9

Hirschfeld v. New Mexico Corrections Dept., 916 F.2d 572 (10th Cir. 1990) 11

Hukkanen v. International Union of Operating Engr's, Hoisting & Portable Local 101, 3 F.3d 281, 284 (8th Cir. 1993) 9,10

May v. Arkansas Forestry Comm'n, 993 F.2d 632 (8th Cir. 1993) 6

Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130 (4th Cir. 1988) 11,12

Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989) 10

United States v. Pool, 660 F.2d 547 (5th Cir. 1981) 7,8

United States v. Pugliese, 712 F.2d 1574 (2d Cir. 1983) 9

Wheeler v. Sims, 951 F.2d 796 (7th Cir. 1992) 6

Statutes:

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 2

28 U.S.C. §1331 2

28 U.S.C. §2101(c) 2

Mo.Rev. Stat. §213.010, *et seq.* 3

42 U.S.C. §2000e, *et seq,* 2,3

Rules:

Fed.R.Evid. 101 8

Fed.R.Evid. 101(a) 8

Fed.R.Evid. 103(a) 11,12

Fed.R.Evid. 403 13

Fed.R.Evid. 901 8

No. 95-37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JODY M. BERARDI,
Petitioner,

VS.

ANHEUSER-BUSCH, INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Anheuser-Busch, Inc., respectfully requests that the Court deny the Petition for a Writ of Certiorari requested herein.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reproduced in Petitioner's Appendix (hereinafter "Pt. App.") at pages A-1 through A-4. The opinion is unpublished. The order of the Court of Appeals for the Eighth Circuit denying the petition for rehearing and suggestions for rehearing en banc was filed on April 7, 1995 and is reproduced in Petitioner's Appendix at B-1.

The judgment of the District Court, along with its memorandum opinion, regarding claims that were triable to and decided by the court, was filed on April 15, 1994, and is reproduced in Petitioner's Appendix at C-1 through C-9. The order entering judgment on the jury verdict regarding those claims that were tried to the jury was filed on August 13, 1993, and is reproduced in Petitioner's Appendix at D-1.

JURISDICTION

This Court has jurisdiction to review the order dated April 7, 1995 denying Berardi's Petition for Rehearing and Suggestions for Rehearing en banc of the Court of Appeals for the Eighth Circuit by a Writ of Certiorari filed on or about July 6, 1995, pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

The Court of Appeals for the Eighth Circuit had jurisdiction over the appeal from the judgment of the United States District Court pursuant to 28 U.S.C. §1291. The District Court below had jurisdiction of this claim of a violation of Title VII, 42 U.S.C. §2000e, *et seq.* pursuant to 28 U.S.C. §1331.

RULES INVOLVED

Federal Rule of Evidence 901, set forth in Petitioner's Appendix E.

STATEMENT OF THE CASE

Berardi began working for Anheuser-Busch, Inc. (hereinafter "Anheuser-Busch") in 1985. At that time, she was employed as a freight handler, a union, hourly position. Although Berardi adduced evidence that there were gender-based comments and pornographic materials in the workplace, Anheuser-Busch adduced evidence that such materials were not displayed and that they were not prevalent in the workplace. Anheuser-Busch also adduced evidence that, for the most part, female employees failed to complain about any alleged co-worker harassment, and that on those occasions when complaints were made, Anheuser-

Busch took appropriate remedial action. In addition, Anheuser-Busch adduced evidence that jobs were assigned in a non-discriminatory manner.

In 1989, despite the alleged harassment, Berardi attempted to move into a management position as a brewing supervisor. In 1990, after obtaining a college degree and passing a series of tests and interviews, she took a job at the Research Pilot Brewery ("RPB") in St. Louis. The RPB is a training facility that prepares brewing supervisor trainees for positions in Anheuser-Busch's other breweries. At approximately the same time that she began working in the RPB, Berardi allegedly began to receive intimidating anonymous phone calls at her home. Also, shortly after she began working in the RPB, three hoses with which she was working "blew up." Berardi discussed the phone calls and the hose incidents with several persons, including company security personnel, and certain precautionary action was taken. In 1991, Berardi requested a return to her previous position as a freight handler, which was denied. Shortly thereafter, Berardi was offered a position as a brewing supervisor trainee at Anheuser-Busch's Columbus brewery, which she rejected. Thereafter, Berardi took a six-month leave of absence in September, 1991. She returned to work in March, 1992. Berardi tendered her letter of resignation on May 6, 1992. Thereafter, Berardi continued to work until May 19, 1992.

Berardi filed the instant action in 1992, alleging violations of Title VII, 42 U.S.C. §2000e, *et seq.*, and the Missouri Human Rights Act ("MHRA"), Mo.Rev. Stat. §213.010, *et seq.* At trial, Anheuser-Busch filed a Motion in Limine asking the District Court to exclude all evidence regarding the phone calls that Berardi received at her home on the basis that Berardi was unable to authenticate the phone calls as coming from an employee of Anheuser-Busch. (A. 158-9, Supp.App. 7-8).[1] The District

[1] Plaintiff-Appellant's Appendix will be referred to as "A." Defendant-Appellee's Supplemental Appendix will be referred to as "Supp.App."

Court granted the Motion in Limine. (A. 167). Thereafter, immediately prior to the presentation of the evidence, counsel for Berardi addressed the Court, on the record, and requested the Court to reconsider its ruling regarding the phone calls. As the basis for this request, counsel argued that there was sufficient evidence to authenticate the phone calls as coming from employees of Anheuser-Busch. (T. 1-1 to T. 1-6). In that regard, counsel for Berardi described for the District Court the timing of the phone calls and the circumstances that he believed provided sufficient authentication of the telephone calls. (T. 1-1 to T. 1-3).

Thereafter, during the direct examination of Berardi, her counsel made an offer of proof regarding the telephone calls. (T. 1-93). Berardi claims that the offer of proof "included Berardi's affidavit and other pretrial material offered in opposition to her Motion in Limine." (Pt. Brief at 9). To the contrary, the offer of proof did not refer to "other pretrial material offered in opposition to her Motion in Limine." The offer of proof referred to Berardi's affidavit and "all of the stuff that was submitted before for that." (T. 1-93). Plaintiff's counsel never identified the additional material to which he was referring in making the offer of proof. The District Court overruled the offer of proof.

SUMMARY OF ARGUMENT

A federal district court has wide discretion in ruling on the admission of evidence. Berardi seeks review of the District Court's ruling that the anonymous phone calls were inadmissible because Berardi could not authenticate the phone calls as coming from an Anheuser-Busch employee. There is simply no special or important reason for this Court to review this evidentiary ruling of the District Court.

In addition, the District Court's ruling excluding the evidence was correct. In the District Court, the only ground that Berardi put forth for the admission of the phone calls was that the timing of the phone calls provided a sufficient foundation to authenti-

cate the phone calls. The District Court correctly concluded that the circumstances of the calls were insufficient to authenticate the phone calls as coming from Defendant's employees.

The other grounds that Berardi raises for the admission of the phone calls were not raised in the District Court and were not preserved for review. Further, even if these arguments had been preserved for review, the exclusion of the calls did not affect a substantial right of Berardi.

REASONS FOR DENYING THE PETITION FOR A WRIT

Rule 10 of the Rules of the Supreme Court of the United States provides that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Petitioner does not suggest that the decision of the Court of Appeals for the Eighth Circuit conflicts with any decision of this Court or that of any other circuit. Petitioner does not suggest that the decision of the Court of Appeals for the Eighth Circuit deviates from the accepted and usual course of proceedings. Berardi's contention is simply that the District Court, exercising its discretion in the admission of evidence, erred in its ruling that the phone calls were inadmissible because Berardi could not authenticate the calls as coming from an employee of Anheuser-Busch. A federal district court is entitled to substantial deference in its ruling regarding the admission of evidence, and its rulings excluding evidence will be reversed only if the district court committed a clear abuse of discretion. *May v. Arkansas Forestry Comm'n*, 993 F.2d 632, 637 (8th Cir. 1993). In sum, there is nothing special or far-reaching about the decision of the Court of Appeals for the Eighth Circuit that would justify the consideration of this Court.

The trial court held that the phone calls were inadmissible because Berardi failed to authenticate the calls. (T. 1-3 to T. 1-7; T. 1-93; A. 158-59; Supp.App. 7-8). In determining whether the trial court abused its discretion in excluding the calls, the inquiry is not whether the reviewing court would have ruled differently if they were considering the issue in the first place, but whether or not the trial court's ruling has a rational basis. *Wheeler v. Sims*, 951 F.2d 796, 802 (7th Cir. 1992) (citations omitted).

The District Court did not abuse its discretion in concluding that Berardi could not authenticate the calls. Berardi's Affidavit establishes that Berardi could not identify the caller's voice. (Berardi Affidavit, ¶12, A. 83). Further, the caller never identi-

fied himself as an employee of Anheuser-Busch, nor did he provide any information suggesting that he was an employee of Anheuser-Busch. (Berardi Affidavit, ¶¶11-12, 20, 35, 48, A. 82-83, A. 88, A. 90). The only connection between the calls and Anheuser-Busch is the fact that the calls allegedly began on the evening of the day on which a person who claimed to be Berardi's supervisor obtained her phone number from her mother.[2]

In reaching its conclusion that the mere coincidence of the calls does not provide a sufficient foundation to authenticate the calls, the Court of Appeals for the Eighth Circuit relied upon *United States v. Pool*, 660 F.2d 547, 569 (5th Cir. 1981). *Berardi v. Anheuser-Busch, Inc.*, No. 94-2063 EMSL slip op. at 3 (8th Cir. February 16, 1995) (Pt.App. A-4). In *Pool*, a defendant was allegedly involved in a conspiracy to import and distribute marijuana which was discovered by a clandestine undercover operation. Defendant's conviction was based on the fact that an individual, using the nickname that the defendant used in the undercover operation, told the government agent that another defendant wanted the agent to obtain a boat to transport marijuana. The Court of Appeals for the Fifth Circuit ruled that the circumstances of the call did not provide sufficient authentication of the call, despite the fact that only someone with the clandestine operation would have contacted the agent with this request and used this particular nickname. Berardi has even less evidence connecting the phone calls to Anheuser-Busch. Unlike the content of the calls at issue in *Pool*, nothing in the content of the calls to Berardi suggested that the caller was an employee of Anheuser-Busch.

---

[2] Berardi also claimed that *on one occasion*, a year and a half after the calls began, she received a call in which Anheuser-Busch advertising jingles were played. (Berardi Affidavit, ¶40, A. 10). This fact does not demonstrate that the calls came from Defendant's employees. The advertising jingles were played on national television, and anyone with a tape recorder could tape them. Thus, it is just as likely that the calls were made by someone not employed by the brewery, who was aware that Berardi worked there.

Berardi argues that *Pool* is inapplicable to the instant case because *Pool* was a criminal case and the state bore the burden of proving the defendant's guilt by a reasonable doubt. Thus, Berardi argues the Court of Appeals for the Fifth Circuit excluded the phone calls because the standard for authentication of phone calls is higher in a criminal case than a civil case. (Pt. Brief at 28). However, Berardi cites no authority for the proposition that the rules for the authentication of evidence differ depending on whether a case is a criminal or a civil case. To the contrary, Federal Rule of Evidence 101 provides that the Federal Rules of Evidence "govern proceedings in the courts of the United States ...." Fed.R.Evid. 101 draws no distinction between civil and criminal cases with respect to the applicability of the rules of evidence.

Berardi also argues that the phone calls are admissible because Defendant's employees concluded, based upon the facts before them, that the phone calls came from Defendant's employees. Notably, Berardi cites no authority for the proposition that the *conclusion* of a *witness* that the phone calls are from a particular source provides sufficient authentication of phone calls. Under the Federal Rules of Evidence, it is the sole province of the district court to determine whether or not the phone calls are admissible because there has been sufficient authentication. Fed.R.Evid. 101(a), Fed.R.Evid. 901. To substitute the conclusion of a witness for that of the district court is to invade the province of the district court in ruling on the admissibility of evidence.

Berardi also claims that the phone calls were relevant to her claim of constructive discharge because the jury could have concluded that she was justified in resigning her position in the RPB because she feared for her safety. Berardi failed to preserve this argument for review because she failed to make it before the District Court. The *only* evidence presented by Berardi's trial counsel was that the phone calls were admissible as direct

evidence of sexual harassment coming from Defendant's employees. This is evident from the fact that: 1) Berardi's response to the Motion in Limine stated that "[t]he evidence is certainly sufficient to allow the jury to consider the calls as part of the harassment" (A. 161); 2) in the colloquy that occurred on the first day of trial when Berardi asked the trial judge to reconsider the ruling on the phone calls, Berardi argued only that there was sufficient evidence to authenticate the calls (T. 1-1 to T. 1-7); 3) Berardi's offer of proof during Berardi's direct examination was merely a request that the trial court consider Berardi's Affidavit setting forth the circumstances of the calls (T. 1-93); and 4) Plaintiff's Motion for a New Trial or for Judgment Notwithstanding the Verdict stated that "[t]he Court errored [sic] in ...excluding all evidence of harassing phone calls ...because of circumstances indicated [sic] that such phone calls ...were related to her employment and under the circumstances could only have been made by someone employed at the Defendant company." (A. 240). Berardi never asserted at trial that the calls were relevant to show a justification for Plaintiff's alleged fear. By failing to raise this ground for admissibility of the calls to the trial court, Berardi has waived it. *United States v. Pugliese*, 712 F.2d 1574, 1580 (2d Cir. 1983); *Foster v. Ford Motor Co.*, 621 F.2d 715, 721 (5th Cir. 1980).

Further, even if Berardi had preserved her argument that the calls were relevant to her claim of constructive discharge, Berardi's receipt of anonymous harassing phone calls at her home is irrelevant to her claim of constructive discharge. "A constructive discharge exists when an *employer* deliberately renders the employee's working conditions intolerable and thus forces [the employee] to quit ...." *Hukkanen v. International Union of Operating Engr's, Hoisting & Portable Local 101*, 3 F.3d 281, 284 (8th Cir. 1993) (citing *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981)) (emphasis supplied). Alternatively, plaintiffs may prove a constructive discharge by "showing their resignation was a reasonably foreseeable conse-

quence of *their employer's discriminatory actions*." *Id.* at 285 (emphasis supplied). Thus, in order for the phone calls to be relevant to her claim for constructive discharge, Berardi must produce admissible evidence that the intolerable condition is attributable to Anheuser-Busch.

The fact that Berardi received harassing phone calls at her home has no bearing on her claim for constructive discharge. If Berardi identified the calls as coming from her next door neighbor, surely she would not argue that those phone calls would be evidence supporting a constructive discharge claim. They would not be attributable to Anheuser-Busch. Consequently, Berardi's receipt of anonymous harassing phone calls at her home is no different. Not being attributable to Anheuser-Busch, they are not evidence that would support a constructive discharge claim.

Berardi has failed to cite a single case in which a court has imputed liability to an employer for an employee's constructive discharge based on the receipt of anonymous phone calls. Berardi cites *Hukkanen*, *supra*, 3 F.3d at 281, and *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989) in support of her claims that the phone calls were relevant to her constructive discharge. However, in those cases, the plaintiffs were subjected to sexual harassment by management level employees whom the plaintiffs were readily able to identify. Neither case involved harassment from an anonymous source that the plaintiff could not link to the employer. Thus, neither case supports Berardi's contention that anonymous phone calls can be used to establish co-worker harassment. Berardi's suspicion that the calls were made by employees of Anheuser-Busch does not suffice for admissible evidence. Mere suspicion does not make the phone calls relevant to a constructive discharge claim.

Even if Berardi is correct that the phone calls should have been admitted, the exclusion of the evidence is reversible error only if the exclusion of the evidence affected a substantial right of

Berardi. Fed.R.Evid. 103(a); *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1135 (4th Cir. 1988). There was abundant evidence that Berardi's working conditions were not intolerable at any point in time and that this was particularly true during the period of time immediately preceding her resignation. Notably, Berardi's own actions belie any claim that her working conditions were intolerable. Berardi returned from her leave of absence and worked for approximately two and a half months prior to tendering her letter of resignation. (T. 1-126 to T. 1-128, T. 2-11, T. 2-74). Berardi herself characterized her act as a "resignation" and nothing in her letter of resignation suggests that she was forced to resign. (T. 2-74, Supp.App., 158). Further, Berardi worked during the two week period after she provided her notice of resignation. (T. 2-74). Berardi's offer of proof demonstrated that for the two and a half months prior to her resignation, *Plaintiff received no phone calls.* (Plaintiff's Affidavit, ¶¶46-48, A. 90). Accordingly, Berardi's prior receipt of the phone calls had little, if any bearing, on the circumstances that existed in the RPB in the two and a half month period prior to her resignation. *See*, *Hirschfeld v. New Mexico Corrections Dept.*, 916 F.2d 572, 580 (10th Cir. 1990) (focus of constructive discharge analysis is on the situation that existed near the time of plaintiff's resignation).

Berardi also argues that the phone calls were admissible to explain her paranoia. However, as set forth above, Berardi failed to present this argument to the District Court and has waived it. Even if this argument had been preserved for review, this argument is without merit. Dr. Ardekani, Berardi's psychiatrist and expert witness, testified in his deposition that Berardi was paranoid, presumably as a result of the phone calls. Without authentication, there was no admissible evidence linking the calls to Anheuser-Busch. Unless Berardi's paranoia was the result of calls that she received from employees of Anheuser-Busch, the source of the paranoia is irrelevant.

Berardi also believes that it was unfair to permit Anheuser-Busch to elicit evidence that Berardi was paranoid without allowing Berardi to explain the reasons for her paranoia. However, Berardi was well aware that Anheuser-Busch intended to elicit evidence of her paranoia. Anheuser-Busch informed the jury of that fact in opening statement and then elicited the evidence during the cross-examination of Dr. Ardekani. (T. 1-34 to T. 1-35, T. 3-56 to T. 3-57). If Berardi felt that it was prejudicial for the trial court to permit Anheuser-Busch to elicit this evidence, it was incumbent upon Berardi to ask the trial court to admit the evidence of the phone calls subject to a limiting instruction that they were admissible only to show that Berardi had a reason to be fearful. Having failed to do this, Berardi cannot now claim that the trial court committed reversible error. *Di Paola v. Riddle*, 581 F.2d 1111, 1113 (4th Cir. 1978), *cert. denied* 440 U.S. 908 (1979).

In addition, the exclusion of this evidence would be grounds for reversal only if the exclusion of the evidence affected a substantial right of Berardi. Fed.R.Evid. 103(a); *Mullen*, *supra*, 853 F.2d at 1135. The exclusion of the evidence that Berardi was paranoid, presumably because of her receipt of the phone calls, did not affect a substantial right of Berardi's. Berardi presented ample evidence which, if believed, would have justified Plaintiff's fear for her safety in the RPB. She testified that on three occasions within the space of three days, high-pressure hoses with which she was working came off of their fittings, resulting in explosions of gas. (T. 1-91 to T. 1-104, T. 1-173 to T. 1-179). She testified that she was fearful after these incidents. (T. 1-123, T. 2-83). These incidents, with their potential for physical harm, are clearly more significant than Berardi's receipt of anonymous harassing phone calls. She testified that she reported the hose incidents to various employees of Anheuser-Busch and that security measures were taken, including the provision of a two-way radio and an escort to her car. (T. 1-94 to T. 1-95, T. 1-99 to T. 1-102, T. 3-82 to T. 3-85, T. 127, T. 129). She testified that

she was fearful of a co-worker and one of her managers. (T. 104, T. 1-168 to T. 1-169, T. 2-72). Plaintiff testified that Dr. Ahmad Ardekani, her treating psychiatrist, and Dr. Lois Daniels, her therapist, told her that she should resign from the RPB. (T. 1-125). If this were not enough, Berardi testified that the hostile work environment that purportedly existed when she was a freight handler contributed to her decision to resign from the RPB. (T. 2-63 to T. 2-64). The phone calls, therefore, were but a small part of Berardi's overall testimony and would not have made a significant difference in the outcome had this evidence been admitted.[3]

CONCLUSION

This case is not one appropriate for review by this Court. It does not present an issue of special importance. Moreover, the Court of Appeals for the Eighth Circuit correctly applied the law. Therefore, Respondent, Anheuser-Busch, Inc., prays this Court to dismiss the Petition for Writ of Certiorari.

Respectfully submitted,

SUSAN NELL ROWE
[Application for Admission Pending]
THE STOLAR PARTNERSHIP
911 Washington Avenue, 7th Floor
St. Louis, Missouri 63101
(314) 231-2800

Counsel of Record for Respondent Anheuser-Busch, Inc.

---

[3] Further, if the phone calls had been presented, it was entirely possible that the admission of the evidence might have been unduly prejudicial to Anheuser-Busch, because the jury might have speculated that the calls came from employees of Anheuser-Busch, despite the absolute lack of any evidence supporting this conclusion. Fed.R.Evid. 403; *Campbell v. Ingersoll Milling Machine Co.*, 893 F.2d 925, 928-9 (7th Cir. 1990), *cert. denied* 498 U.S. 844 (1990).